No. 20526

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SCHNITZER STEEL PRODUCTS CO., a corporation,
Appellant,

vs.

CIA. ESTRELLA BLANCA, LTD., as owner of the S.S. NICTRIC, and AMTRO CORPORATION, S.A.,
Appellees.

AMTRO CORPORATION, S.A.,
Cross-Appellant,

vs.

SCHNITZER STEEL PRODUCTS CO., a corporation, and CIA. ESTRELLA BLANCA, LTD.,
Cross-Appellees.

Brief for Appellee Amtro Corporation, S.A. Answering the Appeal of Schnitzer Steel Products Co.

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In answer to Schnitzer's appeal, Amtro adopts the brief of Owners, Cia. Estrella Blanca, Ltd. We wish to add only the following:

I.

The District Court Did Not, as Schnitzer Asserts, Construe the Lien Clause (Clause 8) Out of the Voyage Charter. The Charter Placed on Schnitzer the Absolute Obligation to Pay the Demurrage and Balance of Freight and Also Gave Amtro a Lien on the Cargo as Additional Security for That Obligation.

Schnitzer's attack on the District Court's interpretation of the voyage charter is based on a mis-state-

ment of the District Court's holding. Schnitzer repeatedly accuses the District Court of reading all of printed clause 8 out of the charter, and of holding that the charter gave no lien on the cargo.[1] The District Court held nothing of the sort. What it did hold was that the unqualified promise by the charterer (Schnitzer) to pay the demurrage in typewritten clause 18 and in the typewritten substitution to clause 7 overrode and superseded the qualified obligation *in the last sentence* of printed clause 8 to pay these sums "only to such extent as the owners have been unable to obtain payment thereof by exercising the lien on the cargo." While the District Court did hold correctly that the lien on cargo could not be exercised under prevailing conditions in Japan, the court recognized that *the charter* gave the lien as an additional remedy.[2]

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[1]This mis-statement of the holding of the District Court occurs again and again in Schnitzer's brief; in the Statement of the Case (page 6):

> "The Court held that Clause 18 of the voyage charter party modified and superseded Clause 8, so that the latter was ineffective and that no lien on the cargo was given for unloading demurrage and unpaid freight."

In the statement of the questions on appeal (page 12):

> "1. Whether the Court misconstrued the voyage charter party in holding that Clause 8 (the lien or cesser clause) was modified out of existence by Clause 18, so that there was no lien given on the cargo for demurrage . . ."

In the specifications of error (page 13):

> "1. The Court erred in entering a decree (R. 153) against Schnitzer Steel Products Co. for any sum other than $500 stevedore damage admittedly due (R. 106), in that the Court's conclusion that Clause 8 (cesser clause) was not a part of the charter party between Amtro and Schnitzer, was an erroneous construction of the charter party . . ."

And in the Argument (page 47):

> "In support of its conclusion that the lien of the cesser clause was not intended to be operative, the Court also found that . . .".

[2]See the following statements in the District Court opinion (the italics ours):

> "Obviously, the requirement that payments of demurrage be made in United States currency would not have been inserted

What was accomplished by the various typewritten additions and deletions in the voyage charter is clear, and was correctly understood by the District Court:

1. The changes transformed what had been, under the printed Gencon form, the obligation of *"merchants"*, *i.e.* the consignees of the cargo, to discharge the vessel within the lay time into an obligation *by charterers* to do so. The language is fully analyzed in Owners' brief. The change was made by crossing out printed clause 6 of the Gencon form, which had placed the discharge obligation on merchants, and substituting typewritten clauses 17 and 18 which obligated charterers to discharge, and to do so within the lay time. Whether Schnitzer passed on the discharge obligation to the consignees under its sales contracts with them has nothing to do with the voyage charter contract between Amtro and Schnitzer. Schnitzer is the party which undertook the absolute obligation toward Amtro that the vessel be discharged within the stated time.

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if the parties had intended an *exclusive* remedy of foreclosure and sale under *the lien provision*." [R. Vol. I, p. 139, lines 15-19].

"The original Clause 8 was nothing more than the so-called 'cesser clause' in the classic *GENCON* charter. Where such a clause is *modified*, as here, by the agreement of the parties, the *modification* prevails over the original clause." [R. Vol. I, p. 140, lines 22-25].

"It is my conclusion on the evidence that Japan has a lien law that might be exercised in the hands of consignees within two weeks after delivery, but that such law was not applicable to the facts in the present case for the obvious reason that the scrap was delivered to persons other than the consignees and that Amtro was not in a position to *effectively assert its* lien on account of the representations of Schnitzer that the demurrage and unpaid freight would be paid. Even if Clause 8 remained in *full* force and effect, not *modified* by the typewritten language, the provision with reference to the exercise of the lien being *the sole remedy*, it should not be enforced on the record before me." [R. Vol. I, p. 144, lines 13-24].

2. The changes in the charter likewise transfer the primary and personal obligation to pay the demurrage from "merchants" to "charterer" (*i.e.* Schnitzer). This is done by crossing out the following language of printed clause 7:

> "7. Ten running days on demurrage . . . payable day by day, to be allowed merchants all together at ports of loading and discharging"

and inserting in its stead and right above it the typewritten words:

> "Demurrage, if incurred, to be paid by charterers."

This is re-emphasized in typewritten clause 18 of the rider which provides, immediately following the language establishing the length of time for loading and discharge:

> ". . . If longer detained, charterers to pay demurrage at the rate stipulated in clause 7 and payments to be made in the same currency as freight payment."

3. This unqualified and primary obligation placed upon charterers to pay the demurrage in the Nictric charter obviously supersedes the qualified and secondary obligation placed upon charterers by the last sentence of printed clause 8 of the Gencon form. This is precisely what the District Court held.

4. These changes are not in conflict with, and do not eliminate, the lien on cargo for the freight and demurrage given by the first sentence of clause 8. Instead, they transform that lien from what had been, under the original Gencon form, a lien to secure payment by the consignees into a lien to secure the payment by Schnitzer of Schnitzer's obligation.

There is nothing unusual about such a lien. It is the familiar maritime lien upon the goods *in rem,* independent of *in personam* rights. Such maritime liens commonly exist on property although the personal obligation is owed not by the owner of the property, but by someone else.

> ". . . The maritime lien in our admiralty jurisprudence attaches irrespective of personal obligation on the part of the owner of the ship or cargo."
>
> *Robinson, Admiralty* (1936), p. 364;
>
> *The Barnstable,* 181 U.S. 464, 467, 21 S. Ct. 684, 685, 45 L. Ed. 954 (1901).

For example, where cargo is carried on a chartered vessel under bills of lading issued only by the charterer, the charterer, and not the owner of the vessel is personally liable for the performance of the contract of carriage, but cargo also has a maritime lien upon the vessel to secure that performance.

> *The Albert,* 61 Fed. 113 (2d Cir. 1894);
>
> *The Poznan,* 276 Fed. 418, 432-3 (S.D.N.Y. 1921—L. Hand, D.J.)

Similarly, when a vessel subject to a maritime lien for an obligation of its then owner is thereafter sold, the vessel remains subject to the lien although the new owner is not personally liable, and only the former owner is.

> *Libbie Purdy,* 32 Fed. Supp. 67, 1940 A.M.C. 416 (D. Mass. 1940);
>
> *Henry S,* 4 Fed. Supp. 953, 1933 A.M.C. 1401 (E.D. Va. 1933).

The owner of the property may as a practical matter be required to satisfy or post security against the lien

claim, but he is then entitled to pursue the party who is personally liable for indemnity.

The maritime lien and the *in personam* rights are cumulative. The creditor may at his election pursue one or the other, or both at once, until he is paid.

Golden Gate, 52 Fed. 2d 397, 1931 A.MC.. 1632, 1636 (9th Cir. 1931); cert. den. 284 U.S. 682, 52 S.C. 199, 76 L. Ed. 576;

The Eastern Shore, 24 Fed. 2d 443, 1928 A.M.C. 327 (D.C.Md. 1928);

The Brothers Agap, 34 Fed. 352 (D.C.N.Y. 1888).

The party personally liable has no right to complain if the creditor pursues him exclusively, instead of pursuing the lien on the goods. Indeed, when both remedies are pursued in one action, the party personally liable is held to the primary liability, and the goods are liable only secondarily, as security in the event that collection cannot be made from the party primarily liable.

The Barnstable, cited *supra;*

The Harper No. 145, 42 Fed. 2d 161 (2d Cir. 1930), cert. den. 282 U.S. 875, 51 S.Ct. 79, 75 L. Ed. 772.

Thus the voyage charter, as correctly interpreted by the District Court, placed the *in personam* obligation on Schnitzer for the demurrage and the balance of the freight, and gave the vessel a lien on the cargo to secure payment by Schnitzer. This is the only interpretation which fits the analysis of the histrical background and business purpose of lien clauses which Schnitzer itself makes in its brief (pp. 36-39). As Schnitzer's

counsel say, the purpose of the clause historically and in most charters is to allocate responsibility for the unloading demurrage so that it places incentive on those responsible for discharge to accomplish it with a minimum of delay, and to require the vessel to collect unloading demurrage and unpaid freight from the parties primarily liable for it, at a time when the pressure is greatest upon them to meet that liability. In the unmodified printed Gencon form, the parties responsible for discharge, and therefore the parties primarily liable for the demurrage, were the consignees. Under the terms of the Nictric voyage charter, Schnitzer, and not the consignees, was the party responsible to Amtro and the vessel for the discharge, and Schnitzer was the party which undertook that the discharge would be completed within the specified time. Therefore, the primary obligation to pay demurrage must be upon Schnitzer, and the lien must be to secure payment of Schnitzer's obligation.

Schnitzer might, as it now contends in its brief, have received a tactical advantage if Amtro and owners had been able to exercise the lien, since Schnitzer might have been able to beat the consignees down when they came to pursue their indemnity rights against Schnitzer. This is not a calculation which the law can respect. Schnitzer, as the party personally and primarily liable, would have had no right to complain even if Amtro and Owners had chosen to pursue Schnitzer alone, without paying any attention to the lien at all.

II.

The Foregoing Construction of the Charter Was the One Followed by Amtro While the Charter Was in Effect and Now. Only Schnitzer Changed Its Construction as Its Advantage Dictated.

Schnitzer's brief seeks to excuse what the District Court found to be Schnitzer's "indefensible" reversal of its interpretation of the charter by accusing Amtro of a similar change. To make this argument possible, Schnitzer mis-states Amtro's contentions in this litigation. Schnitzer's brief says (p. 46).

> "Thus, the only change of position in this litigation is that of Amtro, which now claims that there was no lien on the cargo for demurrage and that Clause 8 of the charter party was not in effect."

Schnitzer cites nothing in the record to support this assertion. It is untrue.[3] The interpretation of the charter urged by Amtro before the trial court and before this

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[3]Amtro's pleadings [Answer, R. Vol. I, pp. 8-13 and Cross-Libel, R. Vol. I, pp. 15-24] are bare of any such claim. The statement of Amtro's contentions on the subject in the pre-trial order [R. Vol. I, p. 109] was:

> "3. The typewritten addendum to the voyage charter, coupled with typewritten amendments to the body of the printed voyage charter, prevail over the printed language of clause 8 of the voyage charter, and by reason thereof Amtro had no obligation, as stated in said clause 8, to endeavor first to obtain payment of freight and demurrage by exercising a lien on the cargo."

The statement is that by reason of the typewritten changes Amtro had no obligation to endeavor first to obtain payment by exercising the lien, which is what Amtro still contends, not that Amtro had no lien. Amtro's position was extensively covered in briefs filed with the trial court, and it is hard to see how Schnitzer's counsel could misunderstand at this stage of the proceedings.

Court is the one set out in the foregoing section of this brief.

This was also the interpretation maintained by Amtro at all times while the charter was in effect. This is why Amtro did not make demand upon the consignees for payment of the demurrage.[4] This is why all the demands for payment of the demurrage, from the time the demurrage commenced to accrue, were made upon Schnitzer. It was upon this interpretation of the charter that Amtro's counsel, after Schnitzer had ignored demands for the demurrage for about a month, directed to Schnitzer the telegram [Ex. 101, R. Vol. II, p. 103] announcing Amtro's intention to exercise the lien unless *Schnitzer* guaranteed and adequately secured payment of the demurrage. This is why, on December 7, 1961, when Schnitzer repudiated what Amtro understood to be Schnitzer's firm agreement to pay the undisputed portions of the demurrage immediately and to arbitrate the disputed amounts [see the Finding of the District Court, R. Vol. I, p. 141, lines 10-12], Amtro attempted to go ahead with the exercise of the lien until it was advised that under the conditions prevailing in Japan the lien could not be exercised.

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[4]The only demand ever made upon the consignees by Amtro is the one contained in Exhibits 106, 107 and 107A, letters written to the consignees by Amtro's counsel on December 21, 1962, nearly a year later. These were written long after the present litigation was instituted, and long after Schnitzer's counsel had begun to press Schnitzer's present theory that the consignees were liable for the demurrage. As stated in Mr. Fletcher's uncontradicted testimony [R. Vol. II, p. 124, lines 8-13], these notices were sent in order to extend the Japanese statute of limitations for another year. No lawyer likes to let time run on any claim even under his opponent's theory of the case, and even though he disagrees with that theory, if a simple notice will stop it. Suing on what one believes to be an unfounded claim is quite another thing, and Amtro finally allowed the statute to run with respect to any claim against the consignees.

This interpretation of the charter is also the one acted upon by owners and their agents in Japan. The communication which Dodwell & Co. Ltd. addressed to the consignees on November 27, 1961 [Ex. F-1 to deposition of Saishoji, trial Ex. 44E] was not a demand for the demurrage against the consignees *in personam,* but merely a notice that the owners intended to exercise the lien if the demurrage was not paid. The object was to advise the consignees that if they wanted their cargo, they should take "the necessary action", *i.e.* get Schnitzer to pay its demurrage obligation. This is further confirmed by the following at the conclusion of Dodwell's cable to owners of December 9, 1961 [Dep. Ex. F4 to trial Ex. 44E, 20-22, 44G 171-172, quoted nearly in full on pages 56 and 57 of Schnitzer's brief]:

> "RECOMMEND YOU CONTINUE EFFORTS GUARANTEE FROM VOYAGE CHARTERERS MEANWHILE WE WILL EMPHASIZE TO RECEIVERS INTENDED LIEN *AND POSSIBLY THEY WILL PRESSURIZE SCHNITZER GIVE SECURITY*"

It was Schnitzer which insisted, until after the cargo had been discharged and delivered and any lien had been lost, that there was no lien on the cargo, and now turns around and contests liability on the basis of Amtro's failure to exercise that very same lien. The evidence supporting the District Court's findings of fact to that effect is quoted and discussed on pages 13-19, 35-37 of Owners' brief.

Amtro's counsel were seriously worried about the possible merit of Schnitzer's contention that Amtro had no lien on the cargo. It was indisputable that if, as Schnitzer was contending, the demurrage, like the bal-

ance of the freight, was not due until after completion of the discharge, the lien was invalid, since the maritime lien on cargo for demurrage and freight is dependent upon possession and lost by delivery of the cargo (see the authorities cited on p. 27 of Owners' Brief). Amtro's view was that under the charter the demurrage became due as incurred. But Amtro's counsel was forced to realize that the charter was most ambiguous on the point, since, as Schnitzer kept pointing out, the language requiring payment of demurrage "day by day" in printed clause 7 had been crossed out. Schnitzer's contentions added greatly to the hazards of any exercise of the lien, but since the lien was the only practical weapon Amtro had with which to compel immediate payment, Amtro had to try to pursue it.

Schnitzer attempts to argue (brief, pp. 74-75) that Amtro knew of Schnitzer's change of position on December 7, 1961, and that this was in time for Amtro to have gone ahead and exercised the lien undeterred by what Schnitzer had said previously. The District Court found to the contrary. It found [R. Vol. I, p. 141, lines 7-9]:

> "Schnitzer relied on this construction of the contract from about November 17 until after the cargo had been discharged on December 31."

The words "this construction" refer to that stated immediately previously in the opinion, namely that Schnitzer agreed to pay the demurrage, but that the demurrage and balance of the freight were not payable until completion of discharge, and that there was no lien on the cargo for the demurrage. The above-quoted finding is fully supported by the evidence. It is true that on December 7, 1961, Mr. Krause informed Mr. Fletcher

that Schnitzer was not going to go through with the agreement which Mr. Krause had previously said that his clients had authorized him to accept [R. Vol. II, pp. 109, 113]. However that agreement had called for the immediate payment of the demurrage incurred to date, not postponement of the entire payment until completion of discharge [Par. 3, Agreement annexed to Amtro's Ex. 68]. On the matter of the lien, Mr. Krause said only that:

> "[Amtro] had better take whatever remedies [Amtro] thought [it] had [R. Vol. II, p. 113, line 20, to p. 114, line 1].

There is testimony by Mr. Lewis, one of Schnitzer's counsel, that on December 11, after he had been unable to beat down the amount which Schnitzer was to pay, he told Amtro's counsel "lien the cargo" [R. Vol. II p. 224, line 14]. Mr. Fletcher's testimony on what was said at that meeting is not in accord with Mr. Lewis [R. Vol. II, p. 114, line 22, through p. 115, line 14]. Even if Mr. Lewis' version is accepted (and the District Court was not required to accept it), his statement did not amount to a retraction of Schnitzer's previous position toward Amtro that any lien on the cargo which Amtro might seek to exercise was invalid under the terms of the charter. The purport of his statement in the context was merely "try it if you think you can." This is shown beyond doubt by the letter written by Mr. Krause on behalf of Schnitzer to Owners, and dated December 6 and received by Owners' counsel December 8 [Lib. Ex. 34], which specifically reiterates Schnitzer's position that there was no lien, that owners would be held liable for damages if they attempted to exercise a lien, and that nothing was due prior to discharge of the vessel.

When on December 12, 1961, Mr. Fletcher advised Mr. Lewis that Amtro had learned that it was impossible to exercise the lien, Mr. Lewis' only response was, "Oh, that's interesting" [R. Vol. II p. 115, line 23, through p. 116, line 6]. Mr. Lewis' testimony does not contradict this [R. Vol. II p. 225, line 2]. Thereafter, there was only silence from Schnitzer. Owners' libel on December 14 specifically advising Schnitzer that it was impossible to obtain payment of the demurrage by exercising a lien on the cargo was met with further silence. On December 26, 1961, while a little cargo still remained on board, Amtro's counsel telegraphed Schnitzer demanding payment of demurrage and freight upon completion of discharge, when Schnitzer had contended that it was payable, and placing Schnitzer on notice that failure to pay would cause Amtro the loss of its time charter with owners [Amtro Ex. 60]. Schnitzer left this telegram unanswered until 9:47 P.M. Pacific Standard time on December 29, 1961. This was 2¼ hours before the completion of the Nictric discharge in Japan (under the Admitted Facts, when the International Date Line is taken into account, see footnote 3, p. 13, Amtro's Op. Br., for the citations to the record). At that time Schnitzer sent to Amtro a telegram [Amtro Ex. 61] reading:

> "YOUR TELEGRAM RE NICTRIC DATED 12/26/61 RECEIVED WE HAVE NOT ASSUMED NOR AGREED TO PAY DEMURRAGE UPON COMPLETION OF DISCHARGE. WE DENY ALL LIABILITY FOR DEMURRAGE AND BALANCE OF FREIGHT."

That telegram was no more than an unexplained denial of liability. It contained no hint that Schnitzer had reversed its prior position on the invalidity of Amtro's lien under the charter, or that it denied liability *because* Amtro should have exercised the lien. No notice whatever of the position Schnitzer finally took in the trial court, or is taking upon this appeal, was ever communicated to Amtro or owners until months later.

On that record, Schnitzer's actions can be explained only in one of two ways: Either

(1) When Schnitzer received notice on December 26, 1961, that failure to pay upon the completion of discharge would break Amtro, Schnitzer interpreted the charter in the same way as it always had previously, and knew that it was liable, but wanted to break Amtro in the hope that if Amtro were defunct, Schnitzer could settle its obligation cheaply with Owners, who could be made whole with only part of the demurrage; or

(2) When Schnitzer learned on December 11 that Amtro believed that the lien could not be exercised, it then decided that if it switched its charter interpretation, and kept quiet about the switch until after all the cargo had been discharged and delivered, it might be able to dig up some evidence later to suggest that a lien might have been exercised, and escape liability entirely.

On either explanation Schnitzer's conduct is "indefensible," as the District Court found. On either explanation, the District Court correctly held Schnitzer liable for the full freight and demurrage. The District Court should also have awarded to Amtro, under the legal principles set out in Amtro's Opening Brief on the Cross-Appeal, recovery for the damages caused to it by Schnitzer.

Conclusion.

It is accordingly respectfully submitted that the District Court should be affirmed on the issue of Schnitzer's liability for freight and demurrage, and should be directed to grant to Amtro against Schnitzer the further relief sought by Amtro's Cross-Appeal.

Respectfully submitted,

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Proctors for Appellee Amtro Corporation, S.A.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT A. FLETCHER